EX PARTE OR LATE FILED

October 17, 2007

To: Secretary, Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Avenue, NE
Suite 110
Washington, DC 20002

ORIGINAL

From: Jean Prewitt, President of the Independent Film & Television Alliance

RE: Ex Parte Presentation

Docket: MB Docket 06-121

The attached memorandum was submitted on October 15, 2007 to FCC Commissioner Copps.

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EX PARTE OR LATE FILED

MEMORANDUM

To: International Film and Television Alliance

From: Jerald A. Jacobs

Date: September 26, 2007

Re: Authority of the Federal Communications Commission

THE FEDERAL COMMUNICATIONS COMMISSION HAS AUTHORITY TO LIMIT THE PERCENTAGE OF CABLE AND SATELLITE PROGRAMMING SOURCED FROM VERTICALLY INTEGRATED TELEVISION, CABLE AND SATELLITE NETWORKS

Executive Summary

In its Comments in MB Docket No. 06-121, the Independent Film & Television Alliance ("IFTA"), requested, among other things, that the Federal Communications Commission (the "Commission" or the "FCC") impose source limitations on the major cable and satellite services. IFTA, the trade association of the independent film and television industry worldwide, supported adoption of a rule prohibiting basic and pay channels from sourcing more than 75% of their entertainment programming from (a) entities operated, controlled by or affiliated with, any of the top ten national cable MSOs or any national direct broadcast satellite operator; or (b) any national television network, or any captive or affiliated entity of such a network.

The purpose of this proposal was to maintain the viability of the independent film and television industry, which is necessary to insure adequate source diversity, and essential to the continued viability of free, over-the-air television. The goals of program source diversity and of preserving over-the-air free television have been found by the Supreme Court to constitute important governmental purposes of the highest order. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997)("*Turner II*").

The Commission has authority to adopt and enforce such a rule. The Communications Act gives the Commission general regulatory authority over cable and satellite system operations, and the Commission has already adopted and enforces numerous regulations which directly or indirectly relate to program content impact on those operations. The proposed regulation is no more intrusive than these existing regulations.

Moreover, Section 11(c) of the *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460 ("*1992 Cable Act*") specifically directs the Commission to set limits on operators' vertical integration with suppliers of programs to be carried over cable systems. 47 U.S.C. §533(f)(a)(1)(B). While the initial regulations designed to implement that provision were remanded by the Court of Appeals in *Time Warner Entertainment Co., L.P.*, v. *Federal Communications Commission,* 240 F3d 1126 (U.S. App. D.C. 2001)("*Time Warner II*"), on First Amendment grounds because the Commission had failed to show that the vertical

integration limits it had chosen did not burden more speech than necessary, the limit in question was set at 40% of channel capacity, reserving 60% for programming by non-affiliated firms. See 47 C.F.R. §76.504; *Second Report*, 8 F.C.C.R. at 8593-94 p 68; *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, 10 F.C.C.R. 7364, 7368 p 14 (1995). Here IFTA proposes a much lower level of source diversity, one which clearly falls within a range of reason and which in no way can be said to burden speech unreasonably.

Thus, the proposed regulation encouraging source diversity in the cable and satellite television industry furthers an important public interest goal, lies well within the established boundary of the FCC's regulatory authority, meets a statutory requirement, and raises no First Amendment concerns. Under the circumstances, the Commission should move ahead to adopt IFTA's modest proposal.

Discussion

As demonstrated in IFTA's comments, the source diversity in the offerings of cable television and satellite program services is diminishing rapidly. Starting with the major pay programming services such as HBO and Showtime, all of the major basic cable/satellite channels that feature scripted fiction programming, such as Lifetime, Sci Fi, and USA, have significantly cut back their acquisition of independent programming. Where these organizations do acquire independently produced programming, they will do so only under the most egregious commercial terms, such as demanding ownership

rights, refusing to pay license fees adequate to cover full production costs, and demanding rights to income from exploitation in different markets and media.

The largest cable operators favor their own programming over independently produced programming. Generally, programming for these channels is done in-house or by "tied" producers who have contracted to produce product under terms that are unacceptable to truly independent producers.

This trend is directly related to growing vertical integration in the cable and satellite business. As IFTA noted in its Comments, almost all of the 29 channels that purchase scripted, fiction programming are owned or controlled by one of the four major television networks or by a major cable television system owner – all vertically integrated media conglomerates.

This situation is not in the public interest. Indeed, Congress, in adopting the *1992 Cable Act*, made a direct finding and declaration that

> (4) The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.
>
> (5) The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.

(6) There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technological media.

1992 Cable Act, Section 2(a)(4)-(6).

The Commission has the authority necessary to address these important public interest considerations. It has authority to regulate the cable television industry, and has used that authority not merely to exercise control over technical aspects of cable operations, such as insuring that cable transmissions do no leak and cause interference to aeronautical communications, but also to adopt regulations that protect free over-the-television and program producers and distributors. See Part 76 of the Commission's Rules, 47 C.F.R. §76.1 *et seq.* (the "*Cable Rules*"). The Commission is charged with promoting the "widespread dissemination of information from a multiplicity of sources," which, as the Supreme Court noted in Turner I, is important "in the abstract." *Turner I*, 512 U.S. at 663.

Thus, the Commission has adopted a number of regulations which directly or indirectly regulate the content of cable program offerings, including:

FCC Rules Section	Description
§76.56	Must-Carry Of Local Broadcast Signals
§76.62	Broadcast Signals Must Be Carried In Full And Without Material Degradation
§76.64	Broadcaster May Elect Retransmission Consent
§§76.92-76.95	Network Programming Non-Duplication Protection
§§76.101-76.110	Syndicated Programming Exclusivity Protection
§76.111	Sports Programming Blackout
§76.205	Political Cablecasting Regulations; Equal Opportunities
§76.206	Lowest Unit Rates For Legally Qualified Candidates
§76.213	Transmission Of Lottery Information Prohibited.

§76.225	Commercial Limits In Children's Programs
§§76.1000-76.1003	Competitive Access to Programming; Prohibition on Unfair Practices; Program Access Proceedings;

Similar rules apply to satellite operations. See, e.g., 47 C.F.R. §§76.120-76.130.

Not only does the Commission have general regulatory authority over the cable and satellite television industries, it has specific authority to regulate in the area proposed by IFTA. Section 11(c) of the *1992 Cable Act* specifically directs the Commission adopt vertical integration standards which would set "limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." 47 U.S.C. §533(f)(1)(B). The rule proposed by IFTA is addressed at the very same problem, and does so in a moderate way by addressing the percentage of programming within a cable or satellite programming channel that may be provided by vertically integrated programming entities.

IFTA recognizes that the Commission's initial attempt to adopt regulations in this area was remanded by the Court of Appeals for the District of Columbia Circuit in *Time Warner II*. Before reaching its decision, the Court stated that:

> The Commission is on solid ground in asserting authority to be sure that no single company could be in a position single-handedly to deal a programmer a death blow. Statutory authority flows plainly from the instruction that the Commission's regulations "ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions of operators of sufficient size, the flow of video programming from the video programmer to the consumer." 47 U.S.C. §533(f)(2)(A) (emphasis added). Constitutional

> *authority is equally plain.* As the Supreme Court said in *Turner II*: "We have identified a corresponding 'governmental purpose of the highest order' in ensuring public access to 'a multiplicity of information sources.' " 520 U.S. at 190 (quoting Turner I, 512 U.S. at 663); see also *Time Warner Entertainment Co. v. Federal Communications Commission*, 93 F.3d 957, 969 (D.C. Cir. 1996).

Time Warner II at 1131. The Court of Appeals was troubled, however, by the lack of support in the record for the Commission's vertical integration limit, which was set at 40% of channel capacity, reserving 60% for programming by non-affiliated firms. According to the Court, the Commission had failed to justify its chosen limit as not burdening substantially more speech than necessary. "Far from satisfying this test, the FCC seems to have plucked the 40% limit out of thin air." Id.

The same cannot be said for the proposal offered by IFTA. Here IFTA proposes that cable and satellite program services obtain a modest 25% of their programming from independent sources unaffiliated with vertically integrated networks. That number is well supported by the evidence and economic studies submitted with IFTA's Comments. The proposal goes a long way towards meeting the goals of Congress expressed in their *1992 Cable Act* findings regarding the benefits of source diversity and in their adoption of Section 11(c) of the *1992 Cable Act.*

Most importantly, the proposed regulation will survive constitutional challenge. The rule proposed by IFTA goes solely to source diversity, and does not regulate program content in any way. Content-neutral restrictions on speech, such as proposed by IFTA, are reviewable under the intermediate First Amendment scrutiny standards

established by *United States v. O'Brien*, 391 U.S. 367 (1968). *Turner I*, 512 U.S. at 662.

> Under *O'Brien*, a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 377.
>
> To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, *supra*, at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985)). Narrow tailoring in this context requires, in other words, that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, *supra*, at 799.

Turner I at 663, citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1988).

Applying the O'Brien test to the regulation proposed by IFTA, it is readily apparent that

(1) The proposed regulation is narrowly tailored to serve significant governmental interests in a direct and material way, as providing a diverse source of program content has been found to be a governmental interest of the highest order. *Turner I*, *supra*. Moreover, insuring the viability of independent program sources will help insure the viability and survival of free over-the-air television in a period of great stress due to the conversion to digital transmissions and multicasting, a goal which has been repeatedly found to be a

major and appropriate government interest. *Turner I and Turner II*, *supra* ;

(2) IFTA's proposal is unrelated to the suppression of free speech. It is content-neutral, as it focuses on the source, but not the content, of the affected programming. See Turner I and Turner II (Must-carry requirement is content-neutral as it focuses on the programming source, not its content; and

(3) ample alterative channels for communication of information will be left open if the proposed rule is adopted.

For these reasons, it is clear that IFTA's proposal to limit cable programming services to acquiring no more than 75% of their programming internally or from other vertically integrated television, cable and satellite networks is a reasonable requirement, consistent with the Commission's goals and Congressional instruction, and on sound constitutional footing. There is ample basis for the Commission to adopt IFTA's proposal.